

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

REANNA G.,

Plaintiff,

v.

ACTING COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 3:22-cv-05856-TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application (filed April 16, 2020) for disability insurance benefits ("DIB"). AR 15, 183. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 3. Plaintiff challenges the ALJ's decision finding that plaintiff was not disabled. Dkt. 1, Complaint.

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of Social Security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (internal citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted). The Court must consider the administrative record as a whole. *Garrison v.*

1 *Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014). The Court also must weigh both the  
2 evidence that supports and evidence that does not support the ALJ's conclusion. *Id.*  
3 The Court may not affirm the decision of the ALJ for a reason upon which the ALJ did  
4 not rely. *Id.* Rather, only the reasons identified by the ALJ are considered in the scope  
5 of the Court's review. *Id.*

6 Plaintiff asserted that her date of disability onset was March 20, 2020. AR 15.  
7 Plaintiff's date last insured under the DIB insured status requirements was December  
8 31, 2020. AR 16. The ALJ found plaintiff had the following severe impairments:  
9 "polyarticular psoriatic arthritis, fibromyalgia, and generalized anxiety disorder." AR 17.  
10 For plaintiff's RFC, the ALJ determined plaintiff would be capable of: "light work", see 20  
11 CFR 404.1567(b), with certain modifications. AR 27. "[Plaintiff] was able to perform work  
12 that does not require climbing ladders, ropes, or scaffolds. [Plaintiff] was able to  
13 frequently balance, occasionally climb ramps and stairs, and occasionally stoop kneel,  
14 crouch, and crawl. [Plaintiff] could frequently handle bilaterally and could occasionally  
15 overhead reach bilaterally. [Plaintiff] was able to perform work that allowed her to avoid  
16 concentrated exposure to vibration and hazards. [Plaintiff] was able to perform simple,  
17 routine tasks. AR 21-22.

18 The ALJ found at step four, plaintiff could not perform her prior relevant work. AR  
19 26. But she could perform the requirements of certain occupations, such as Cashier II;  
20 Fast foods worker; and Marker. AR 27. The ALJ determined at step five that plaintiff  
21 was not disabled. AR 27-28.

## DISCUSSION

**1. Plaintiff's statements regarding symptoms and limitations**

Plaintiff contends the ALJ erred by failing to identify the statements of plaintiff that the ALJ found to be not credible. Dkt. 9, Opening Brief, at 6. In addition, plaintiff contends the ALJ erred by not giving any explanation or logical bridge to show a nexus between the plaintiff's statements that the ALJ found to be less than credible, and any evidence in the record that would show lack of credibility. In addition, plaintiff argues the ALJ's determination of plaintiff's lack of credibility is unsupported by substantial evidence and is not grounded in clear and convincing reasons. Dkt. 9, at 7-15

The ALJ's determinations regarding a claimant's statements about limitations "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (*citing Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In assessing a Plaintiff's credibility, the ALJ must determine whether plaintiff has presented objective medical evidence of an underlying impairment. If such evidence is present and there is no evidence of malingering, the ALJ can only reject plaintiff's testimony regarding the severity of symptoms for specific, clear, and convincing reasons. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (*citing Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

"Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (*citing Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th

1 Cir.1995)). But an ALJ may not reject a claimant's subjective symptom testimony "solely  
2 on a lack of objective medical evidence to fully corroborate the alleged severity of pain."  
3 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991); *Byrnes v. Shalala*, 60 F.3d 639,  
4 641-42 (9<sup>th</sup> Cir. 1995) (applying rule to subjective complaints other than pain).  
5 Treatment records cannot be cherry-picked; the ALJ must consider a particular record  
6 of treatment in light of the overall diagnostic record. *Ghanim v. Colvin*, 763 F.3d at 1164.

7 An ALJ may discount a claimant's testimony based on daily activities that either  
8 contradict their testimony or that meet the threshold for transferable work skills. *Orn v.*  
9 *Astrue*, 495 F.3d 625, 639 (9<sup>th</sup> Cir. 2007). None of the activities the ALJ pointed to  
10 would amount to a contradiction or a work-related function or skill. AR 21. Plaintiff stated  
11 that between March and December of 2020, her husband was handling household  
12 chores, shopping, and cooking. AR 57-59. She stated that at times she had better days  
13 and was more active, but even then it was very difficult. AR 59-60.

14 In this case, the ALJ's reasons for discounting plaintiff's statements about  
15 symptoms and limitations were not clear, specific, and convincing, and were not based  
16 on substantial evidence. As plaintiff points out in the Reply (Dkt. 14 at 4), the record  
17 shows she was taking medications to treat numerous infections during 2020, and the  
18 ALJ did not take this into account when reasoning that plaintiff should have taken  
19 immunosuppressive medications – and using this as a basis for discounting plaintiff's  
20 statements. AR 23-24.

21 Plaintiff stated in July 2020 that she could only lift 10 pounds; standing was  
22 painful to her back and feet, walking was painful to her spine, sitting was painful to her  
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1 lower back. AR 215. She could walk for only five to ten minutes, and although she could  
2 do some chores, she spent time lying down during the day. AR 211.

3 She testified, during the hearing in August of 2021, that from March 2020 through  
4 December 2020 -- the heaviest thing she lifted was 20 to 25 pounds – and, due to back  
5 pain (which she described as level 10 pain that could last for hours or days) she had  
6 difficulty bending, moving, reaching out forward, sideways, upward, grabbing or holding  
7 things, or sitting. AR 53-54, 59-60, 62-63. She also testified that she slipped a disc in  
8 her back in 2020 and was having other physical symptoms from arthritis in her spine  
9 that prevented her from walking, and made it painful to move or walk, and doing almost  
10 anything could result in a spasm in her back, neck, or stomach – she also had difficulty  
11 even getting out of bed. AR 46, 53-54. She could only sit 45-60 minutes at a time before  
12 she would need to reposition, stand up, or stretch. She could stand for only 20 minutes  
13 before it would be necessary to sit, move, reposition, or be laying down. AR 55, 58.

14 Between March 2020 and December 31, 2020, plaintiff underwent significant  
15 treatment and later had ileostomy surgery to address gastrointestinal (including chronic  
16 constipation (AR 299, 432, 505, 507, 510), severe abdominal pain, pyelonephritis,  
17 recurrent infections of the urinary tract (AR 380, 466, 490, 503, 507, 510), multiple  
18 abscesses in her abdomen and pelvis (AR 388, 407, 624), and dehydration requiring IV  
19 fluids (AR 470-471). At the same time, she experienced pain from several sources: low  
20 back pain, arthritis, fibromyalgia, and lumbar radiculopathy. AR 516-518, 522-524.

21 MRI's taken in April 2020 and in March 2021 showed a disc herniation that impinged on  
22 the right L5 traversing nerve root. AR 475, 481-482. She had epidural steroid injections  
23 that affected her kidney function, according to Dr. Louie's notes on March 18, 2021. AR  
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1 478. Plaintiff testified that anti-inflammatories that doctor prescribed for her had quit  
2 working and caused kidney infections, so she was not able to take them regularly. AR  
3 47, 61.

4 Before having laparoscopic loop ileostomy surgery in November 2020, the  
5 physicians who treated plaintiff noted back and radicular pain, beginning in late 2019.  
6 AR 432-434, 558. Plaintiff was being treated for spondyloarthropathy with medications –  
7 but the side effects became onerous. AR 47, 301-302, 328. In early 2021, plaintiff  
8 concluded treatment for chronic constipation, and had back surgery in early 2021. AR  
9 475, 478.

10 Rather than cherry-picking certain medication choices, the ALJ must consider a  
11 particular record of treatment in light of the overall diagnostic record. *Ghanim v. Colvin*,  
12 763 F.3d at 1164. Here, there is objective evidence of impairments, and objective  
13 evidence that the medically determinable impairments could reasonably be expected to  
14 produce some degree of symptoms. See, *Smolen v. Chater*, 80 F.3d 1273, 1281-1282  
15 (9<sup>th</sup> Cir. 1996).

16 All this medical evidence indicates that plaintiff sought treatment for her  
17 conditions during the relevant period and followed the recommendations of her health  
18 care providers. This eviscerates the ALJ's inferences (AR 23) that plaintiff failed to seek  
19 more significant treatment and that plaintiff had "generally normal" physical  
20 examinations. There is ambiguity in the record concerning the intervals and reasons for  
21 plaintiff's inability to take certain medications, or particular choice of treatment for  
22 inflammatory arthritis; on remand, the Commissioner should resolve this ambiguity with  
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appropriate inquiry, and potentially with additional medical evidence. *See, Smolen v. Chater*, at 1288.

## 2. Harmless error

An error that is inconsequential to the non-disability determination is harmless. *Stout v. v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). If the errors of the ALJ result in a residual functional capacity (RFC) that does not include relevant work-related limitations, the RFC is deficient, and the error is not harmless. *Id*; *see also*, *Carmickle v. Comm’r. Soc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008); *Embrey v. Bowen*, 849 F.2d 418, 422-423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848 Fed. Appx. 715, 718 (9th Cir. 2021) (unpublished).

If the ALJ had properly evaluated medical evidence that supported the plaintiff’s statements about her back condition, fibromyalgia, arthritis, and sciatica, that she testified had caused severe work-related limitations between 2019 and the date of the hearing, the ALJ may have come to a different conclusion about plaintiff’s RFC. The Vocational Expert (VE) testified that an accommodation would be required, and there would be no regular competitive jobs, if a person was capable of light work but was required to change positions every 30 to 60 minutes, for three to five minutes. AR 69-70. The ALJ did not ask the V.E. whether regular intervals of laying down would be allowed.

The ALJ found plaintiff was capable of light work and “[plaintiff] was able to frequently balance, occasionally climb ramps and stairs, and occasionally stoop kneel, crouch, and crawl,” and that she could “frequently handle bilaterally”. If plaintiff’s statements about the limitations caused by back pain, fibromyalgia, arthritis, and

1 sciatica, are reviewed on remand, the ALJ's assessment of plaintiff's ability to  
2 accomplish "light" work, and to handle, balance, climb, stoop, kneel, crouch, and crawl,  
3 during the relevant period (date of onset March 20, 2020, and no later than December  
4 31, 2020 – the date last insured) may be different. The questions posed by the ALJ to  
5 the Vocational Expert also may be different. See AR 68-72. Therefore, the error in  
6 evaluating plaintiff's statements is not harmless.

### 7 **3. Lay witness evidence**

8 When evaluating opinions from non-acceptable medical sources such as a family  
9 member, an ALJ may expressly disregard such lay testimony if the ALJ provides  
10 "reasons germane to each witness for doing so." *Turner v. Comm'r of Soc. Sec.*, 613  
11 F.3d 1217, 1224 (9th Cir. 2010) (*quoting Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.  
12 2001)). The ALJ also may "draw inferences logically flowing from the evidence." *Sample*  
13 *v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

14 For applications filed on or after March 27, 2017, such as this one, an ALJ is "not  
15 required to articulate" how he or she evaluated evidence from non-medical sources  
16 such as educational personnel, public and private social welfare agency personnel, and  
17 other lay witnesses. 20 C.F.R. § 404.1502(e). Yet lay witness statements are not listed  
18 in the regulation that identifies evidence that is inherently of no value, or non-  
19 persuasive. 20 C.F.R. § 404.1520b(c). Because the Ninth Circuit has not overruled any  
20 of the cases that require "germane reasons" for the ALJ to reject lay witness evidence,  
21 the Court will apply that standard.

22 In this case, plaintiff's spouse testified concerning how limited plaintiff's activities  
23 were, due to her back problems, fatigue, and gastrointestinal disorders. AR 54-65.



1 Plaintiff also presented information from her father-in-law, who stated that she was  
2 limited in her standing, sitting, walking, and lifting. AR 226. The ALJ rejected these  
3 statements for the same reason the ALJ did not accept plaintiff's statements about  
4 symptoms and limitations as being credible. As the Court has determined the ALJ erred  
5 with respect to plaintiff's testimony, the Court remands for consideration of lay witness  
6 statements.

7 **4. Remand for additional proceedings.**

8 “The decision whether to remand a case for additional evidence, or simply to award  
9 benefits [,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664, 682  
10 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an  
11 ALJ makes an error and the record is uncertain and ambiguous, the court should  
12 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
13 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy  
14 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
15 at 668.

16 The Ninth Circuit has developed a three-step analysis for determining when to  
17 remand for a direct award of benefits. Such remand is generally proper only where

18 “(1) the record has been fully developed and further administrative  
19 proceedings would serve no useful purpose; (2) the ALJ has failed  
20 to provide legally sufficient reasons for rejecting evidence, whether  
21 claimant testimony or medical opinion; and (3) if the improperly  
22 discredited evidence were credited as true, the ALJ would be  
23 required to find the claimant disabled on remand.”

24 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th  
25 Cir. 2014)).

1 The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,  
2 the district court still has discretion to remand for further proceedings or for award of  
3 benefits. *Leon*, 80 F.3d at 1045.

4 Based on a review of the record, the Court concludes that the record is not free  
5 from important and relevant conflicts, considering the plaintiff's history of medical  
6 treatment. Therefore, this matter should be reversed for further administrative  
7 proceedings, including a *de novo* hearing, not with a direction to award benefits. See *id.*

8  
9 CONCLUSION

10 Based on the foregoing discussion, the Court concludes the ALJ improperly  
11 determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and  
12 remanded for further administrative proceedings. The Commissioner is directed to hold  
13 a *de novo* hearing to properly evaluate plaintiff's statements about her symptoms and  
14 limitations; the Commissioner shall also consider the lay witness evidence; and the  
15 Commissioner shall allow plaintiff an opportunity to present additional evidence.

16 Dated this 5th day of September, 2023.

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18 Theresa L. Fricke  
19 United States Magistrate Judge  
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